

No. 48337-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

vs.

MICHAEL MORIARTY,

Appellant/Cross-Respondent.

Appeal from the Superior Court of Washington for Pacific County

Respondent/Cross-Appellant's Reply Brief

MARK McCLAIN
Pacific County Prosecuting Attorney

By:



Mark McClain, WSBA No. 30909
Prosecuting Attorney

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I. ASSIGNMENTS OF ERROR

1. The Respondent Cross-Appellant provided a sufficient record for review.
2. The issue is not moot.

II. ISSUES

1. The record is sufficient for a review of the jurisdictional sentencing issue.
2. Moriarty has yet to serve the complete sentence and, despite this, the issue is of a public nature with authoritative determination desirable to provide future guidance to public officers, and the issue is likely to recur.

III. STATEMENT OF THE CASE

Moriarty asserts the State “set up the issue for review,” therefore waiving an appellate review, and further asserts, incorrectly, the State did not raise this issue below.¹ The State opposed this motion from the outset and provided a memorandum in opposition to the sentence. CP 62 (attached for convenience in Appendix A).

The trial court, initially, ordered 4 months of confinement and authorized, as an alternative, conversion of 30 days of the sentence to be served as community restitution pursuant to RCW 9.94A.680.

¹ Reply Brief of Appellant to Respondent’s Cross-Appeal at page 4.

CP 43. The Court, on its own motion,² issued a decision amending the Judgment and Sentence to reflect a reduction of 30 days, resulting in a three month sentence plus 30 days of electronic home monitoring or work release. CP 64.

Moriarty entered the Pacific County Jail on October 22, 2015 and remained in custody until December 11, 2015. Without further evidence of Moriarty's custodial status, he asserts he remained in custody though detention at an alternative facility (Wahkiakum County Jail) where he was then placed on electronic home monitoring (EHM) beginning February 1, 2016 and completed his sentence without incident.³ This is incorrect. At best Moriarty served 15 days of EHM and the balance was stayed with agreement of Moriarty's appellate counsel pending the outcome of the appeal.⁴

² CP 64 asserts the motion was an oral motion of the Plaintiff, but that appears in error and CP 62 demonstrates the State opposition to the sentence.

³ It is unclear whether Moriarty's appellate counsel is being entirely candid to the tribunal. I would direct this Court to the Appendix B for a review of the letter violation referenced by counsel. The letter clearly indicates Moriarty was removed from the program having served half of the EHM imposed by the sentencing court. See RPC 3.3(a)(1), (4)(c), (f).

⁴ Appendix B is the agreed order staying EHM pending the appeal.

VI. ARGUMENT

A THE STATE DID NOT INVITE ERROR AND THE ISSUE IS PROPERLY BEFORE THIS COURT.

Moriarty makes two assertions in requesting that appellate review be declined: First, the State failed to object at resentencing and thus the error was invited⁵. Second, there is an insufficient record for appellate review.⁶

Moriarty incorrectly asserts there is no record to establish that cross-appellant objected to the amended judgment and sentence.⁷ The State provided the law on the subject for the trial court and opposed the amended judgement and sentence. CP 62. Moriarty asserts that because the documents to modify the sentencing error were provided to the trial court on the State's pleading paper that the State is misrepresenting its opposition at the trial court.⁸ However, CP 62 demonstrates the State's opposition. Consequently, this issue was properly raised at the trial court. Further, RAP 2.5(a)(1) would

⁵ Reply Brief of Appellant to Respondent's Cross-Appeal at page 5, 7

⁶ Reply Brief of Appellant to Respondent's Cross-Appeal at page 7

⁷ Reply Brief of Appellant to Respondent's Cross-Appeal at page 5, 7

⁸ It is the custom in this jurisdiction, with one judge serving two counties, to rely on the Prosecutor's Office to place matters on the calendar and to draft basic pleadings as a "friend of the court." The State did not move the court below to amend the sentence, but instead assisted the court. The State's position was clearly before the court in CP 62 opposing an alternative sanction based on the violent felony conviction.

authorize review because this issue is jurisdictional (as explained below). Moriarty concedes this point.⁹

Moriarty next asserts the State provided an insufficient record for review. A record must have “sufficient completeness” for appellate review of potential errors. *State v. Classen*, 143 Wn. App. 45, 176 P.3d 582 (2008). A “complete verbatim transcript” is not required. *Id.* citing *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003) (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 194, 92 S.Ct. 410, 414, 30 L.Ed.2d 372 (1971)). A record is adequate for review if it represents the facts material to the issues on appeal, it is sufficiently complete for appellate review, and the degree of resultant prejudice, if any, to the defendant. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012). To be adequate for appellate review, the argument should be more than fleeting. *State v. Lazcano*, 188 Wn.App. 338, 354 P.3d 233 (2015) (record is sufficient if it permits “intelligent review” of the issue below).

Here, the State believes that the legal issues are apparent and sufficiently complete to allow for review. It appears from Mr. Moriarty’s brief there was adequate fodder for argument and he makes no assertion that the lack of a record prejudiced the

⁹ Reply Brief of Appellant to Respondent’s Cross-Appeal at page 4

presentation on review. The State's argument below was memorialized in the State's memorandum regarding sentencing and the decision of the court is clear from its order, original judgment and sentence, and amended judgment and sentence.

This is, further, a jurisdictional question which requires no review of the verbatim record, but instead can be resolved on the documents provided and with legal analysis of the issues. Specifically, can a trial court impose an alternative sentence for criminal defendants convicted of a violent offense? To this point, the legislature has indicated that such a sentence is not permitted. RCW 9.94A.680 and RCW 9.94A.734¹⁰. Furthermore, the Supreme Court determined that the reduction is not permitted, precluding alternatives to confinement for violent offenders. *State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989); *State v. Brown*, 108 Wn. App. 960, 962, 33 P.3d 433 (2001). Therefore, review is proper.

B. THIS MATTER SHOULD BE REMANDED FOR RESENTENCING CONSISTENT WITH THE SRA.

Moriarty invites this Court to decline review asserting that the sentence has been served and thus the issue is moot. As noted

¹⁰ RCW 9.94A.731(3) precludes participation unless the offender is attending work or school at regularly defined hours. Moriarty testified at trial that he was retired. RP 9/8/15 143

above, Moriarty has either mischaracterized the record before this court intentionally, or grossly misread the record. Appendix B reflects that Moriarty was removed from the EHM component after serving 15 of the 30 days and the balance of the EHM component was stayed by Moriarty's appellate counsel in this matter pending the outcome of the appeal. Consequently the issue is not moot.

1 Standard of review.

Whether a trial court has exceeded its statutory authority under the Sentencing Reform Act of 1981(SRA) is an issue of law, reviewed independently. *State v. Murry*, 118 Wn. App. 518, 77 P.3d 1188 (2003) (citing *State v. Hale*, 94 Wn. App. 46, 54, 971 P.2d 88 (1999)). Whether a trial court had the authority to modify a sentence is a matter of continuing public interest, "capable of repetition yet easily evading review." *Murry*, 118 Wn. App. at 521, quoting *Hale*, 94 Wn. App. at 52, further quoting *State v. Clark*, 91 Wn. App. 581, 584, 958 P.2d 1028 (1998). If a case presents an issue of continuing and substantial public interest and that issue will likely reoccur, appellate courts may still reach a determination on the merits to provide guidance to lower courts. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (citing *State v. Blilie*, 132 Wn.2d 484, 488 n. 1,

939 P.2d 691 (1997)). The issue of mootness “is directed at the jurisdiction of the court.” *Citizens for Financially Responsible Gov’t v. City of Spokane*, 99 Wash.2d 339, 350, 662 P.2d 845 (1983). The three factors considered essential for application of the public interest exception are: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. *Hart v. Dep’t of Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). There is a continuing and substantial public interest in ensuring that violent offenders are not sentenced to unauthorized alternative sentences. See RCW 9.94A.680 and RCW 9.94A.734. Further, a sentencing court has discretion in sentencing only where the SRA so authorizes. *State v. Shove*, 113 Wash.2d at 89 n. 3. When a trial court exceeds its sentencing authority under the SRA, it commits reversible error. *State v. Hale*, 94 Wn.App. at 53, 971 P.2d 88. Former RCW 9.94A.210(1) does not prevent the State from appealing a sentence modification that exceeds the trial court's authority or is legally erroneous. *State v. DeBello*, 92 Wn.App. 723, 725, 964 P.2d 1192 (1998) (citing *State v. Bernhard*, 108 Wn.2d 527, 530, 741 P.2d 1

(1987), overruled on other grounds by *State v. Shove*, 113 Wn.2d at 83).

2. Moriarty's assertion that the issue is moot is incorrect.

Moriarty has not served his complete sentence as noted above and evidenced in Appendixes B and C. However, even if he had, the issue remains as the trial court has no inherent authority and only limited statutory authority to modify a sentence post-judgment.

While the trial court had the authority to correct an illegal sentence, the trial court had no authority to sentence Moriarty to home detention or work release as an alternative to total confinement. In doing so the trial court imposed an illegal sentence that must be reversed.

Moriarty was convicted of second degree assault, a violent offense pursuant to RCW 9A.030(55)(vii). Moriarty is, therefore, precluded from participating in these alternatives to total confinement. The trial court lacked the authority to reduce the initial sentence imposed of four months to a sentence of three months plus an alternative sentence. The sentence alternatives are not permitted based on Moriarty's conviction of a violent offense.

Moriarty is further prohibited from participation in work release. RCW 9A.030(58) provides: "Work release" means a

program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school. Moriarty testified at trial that he is retired. RP 9/8/15 143. Furthermore, Pacific County does not operate a work release facility.

Thus, Moriarty should be resentenced to a determinative sentence of four months as announced in the trial court's initial pronouncement of sentence.¹¹

IV. CONCLUSION

The trial court lacked the authority to impose an alternative sentence in this matter because Moriarty was convicted of a violent offense. Moreover, since Moriarty has yet to serve the balance of the sentence imposed, the matter should be remanded for resentencing consistent with the SRA.

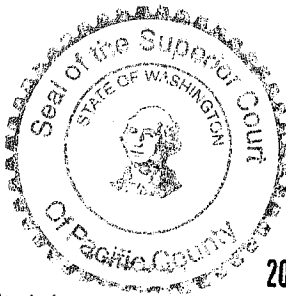
RESPECTFULLY submitted this 31st day of August, 2016.



MARK MCCLAIN, WSBA 30909
Pacific County Prosecutor
Attorney for Plaintiff

¹¹ The trial court announced the sentence of four months, then discussed a conversion to community service, which was not permitted. RP 10/23/15 252

Appendix A



FILED

2015 DEC -8 AM 9:33

VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

BY _____ DEPUTY

STATE OF WASHINGTON } ss.
COUNTY OF PACIFIC

I, Virginia A. Leach, County Clerk and Clerk of the Superior Court of Pacific County, Washington, DO HEREBY CERTIFY that this document, consisting of 3 page(s), is a true and correct copy of the original now on file and of record in my office and, as County Clerk, I am the legal custodian thereof.

Signed and sealed at South Bend, Washington this date:

8/22/16
Virginia A. Leach, County Clerk

By M. Buchanan Deputy

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff

vs.

MICHAEL J. MORIARTY,

Defendant.

Case No. 15-1-00079-7

STATE'S MEMORANDUM REGARDING SENTENCE

COMES NOW, the State of Washington, by and through Mark McClain, Pacific County Prosecutor, and hereby provides the following memorandum related to the Defendant's sentence in light of the Sentence Forecasting Counsel's notification of an illegal sentence.

FACTS

Michael Moriarty was found guilty of second degree assault, a violent offense, following a bench trial. This Court ordered Mr. Moriarty to serve 4 months in custody, but converted 30 days to community service. A defendant who commits a violent offense is not able to complete a form of alternative confinement.

STATE'S MEMORANDUM REGARDING
SENTENCE
Page 1 of 3

PACIFIC COUNTY
PROSECUTING ATTORNEY
300 Memorial Avenue/PO Box 45
South Bend, WA 98586
360-875-9361 (Voice) 360-875-9362 (Fax)

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ARGUMENT

Alternatives to total confinement authorize a court to sentence a non-violent offender to community service, partial confinement, electronic home detention, or treatment alternatives; however, these programs are limited to non-violent offenses. RCW 9.94A.680. Second degree assault is a violent offense. As a result, the Defendant must serve his sentence in total confinement rather than in some alternative format and the provision authorizing one month of the sentence imposed to be served as community service must be stricken. The Defendant must serve the Court's announced four-month sentence in total confinement.


The Defense suggests this Court may have provided for two sentences. A three month sentence and then a one-month community service sentence. Such a sentence would be a hybrid sentence, which is not authorized. *State v. Grayson*, 130 Wash.App. 782, 125 P.3d 169 (2005)(portions of sentences running consecutive to other sentences are hybrid and not authorized). Therefore, the trial court cannot reduce the Defendant's sentence in this case when it strikes the unauthorized community service provision.

"SRA sentences may be modified only if they meet the requirements of the SRA provisions relating directly to the modification of sentences." *State v. Shove*, 113 Wash.2d 83, 88-89, 776 P.2d 132 (1989)(Shove involved the reduction in the time served in partial confinement). Likewise, in *State v. Murray*, 118 Wash.App. 518, 77 P.3d 1188 (2003), the Court of appeals overturned a trial court's modification of a

1 sentence indicating it had abused its discretion when the court modified the type of
2
3 alternative confinement.

4 Consequently, the trial court should strike the provisions of the Defendant's
5
6 Judgment and Sentence related to community service and the sentence should only
7
8 reflect the four-month term of confinement which was ordered. The balance of the
9
10 Judgment and Sentence requires no further modification.

11 Dated this 7th day of December, 2015.

12 
13 _____
14 MARK MCCLAIN WSBA#30909
15 Prosecuting Attorney
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Appendix B

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PACIFIC COUNTY, WA
BY [Signature] DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

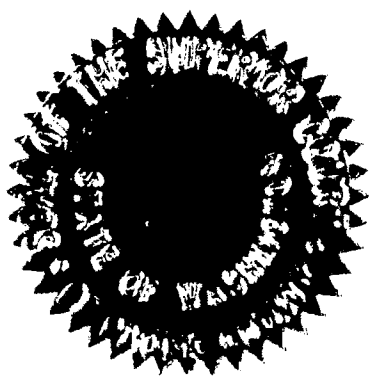
STATE OF WASHINGTON,)
)
Plaintiff,)
)
Vs.)
)
MICHAEL MORIARTY,)
)
Defendant.)

SUPPLEMENTAL CLERK'S PAPERS

PACIFIC COUNTY CAUSE NO. 15-1-00079-7

COURT OF APPEALS NO. 48337-8-II

Supplemental Clerk's Papers transmitted to the Court of Appeals, Division II,
this 1st day of March, 2016.



[Signature]
Virginia A. Leach
Clerk of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)	Court of Appeals No. 48337-8-II
)	
Plaintiff,)	
)	Pacific County Cause No. 15-1-00079-7
vs.)	
)	
MICHAEL J. MORIARTY,)	
)	
Defendant .)	

* * * * *

Appeal from the Superior Court of Pacific County

Honorable Michael Sullivan, Presiding

Counsel for Plaintiff:

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P.O. Box 45
South Bend, WA 98586

Counsel for Defendant:

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902 South 10th Street
Tacoma, WA 98405

**THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY**

STATE OF WASHINGTON,)	Court of Appeals No. 48337-8-II
)	
Plaintiff,)	
)	Pacific County Cause No. 15-1-00079-7
vs.)	
)	I N D E X
MICHAEL MORIARTY,)	
)	(SUPPLEMENTAL)
Defendant.)	
_____)	

1. AFFIDAVIT OF MAILING (69) – 12/21/15	96
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3. FINDINGS OF FACT AND CONCLUSIONS OF LAW (67) – 12/18/15	91 - 94
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff,

Vs.

MICHAEL MORIARTY,

Defendant.

) COURT OF APPEALS NO. 48337-8-II

)

) Pacific County Cause No. 15-1-00079-7

)

)

) CERTIFICATE OF CLERK

)

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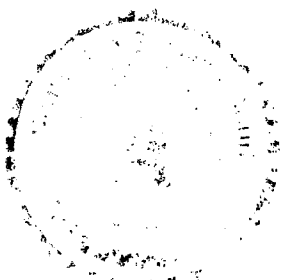
STATE OF WASHINGTON)

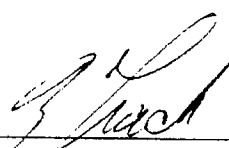
) ss.

County of Pacific)

I, Virginia A. Leach, Clerk of the Superior Court of Pacific County, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above-entitled cause as I have been directed by Mark McClain, Prosecuting Attorney, to transmit to the Court of Appeals as shown by the Designation of Clerk's Papers filed on the 18th day of February, 2016.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Superior Court this 1ST day of MARCH, 2016.




VIRGINIA A. LEACH

Clerk of the Superior in and for the
State of Washington for the County of Pacific

FILED

2016 FEB 18 AM 11:04

VIRGINIA LEACH CLERK
PACIFIC CO. WA

BY

DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

State of WA

Plaintiff,

vs.

Case No.

Moriarty, Michael
Defendant

15-1-00079-7

Wahkiakum County Sheriff's Office

Sheriff Mark C. Howie



P. O. Box 65/64 Main Street, Cathlamet, WA 98612
Undersheriff Steven Marshall

360-795-3242 or 360-465-2202 Fax: 360-795-3145
Chief Civil Deputy Joannie Bjorge

To: Pacific County Superior Court
Attn: Judge Michael Sullivan

Your Honor,

I have had to remove Mr. Moriarty from the Telmate Guardian monitoring service after 15 days on the program. Mr. Moriarty has had multiple violations of the monitoring and while a few of them can be attributed to him having problems comprehending how to use the system, today he was clearly out of the marina boundaries during a time he was not allowed to. During the past two weeks every time I have contacted him because the monitoring system had notified me that there was a violation Mr. Moriarty had been hostile and defiant as to the violation. Today when I made contact with him about being out of the marina grounds, Mr. Moriarty wanted to argue with me at length. If you want or need I can provide you with a lengthy report to include all of the violations, their circumstance, and Mr. Moriarty's response. This e-mail was just to let you know that he has been removed from the system and has failed to complete the 30 days of home electronic monitoring. As much trouble as I have had with him understanding the parameters that he needed to follow I cannot recommend he be given any credit toward his sentence.

Respectfully,

Vernon Barton

Wahkiakum County Sheriff's Office

360-795-3242

Appendix C

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2016 FEB 19 PM 1:31

VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL MORIARTY,

Defendant.

CAUSE NO. 15-1-00079-7


AGREED ORDER STAYING EHM
PENDING THE OUTCOME OF
APPEAL

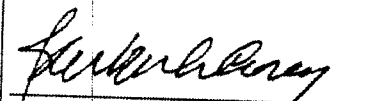
TO: CLERK OF THE COURT

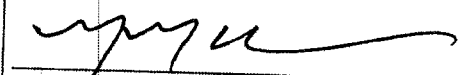
TO: PACIFIC COUNTY PROSECUTOR'S OFFICE

IT IS HEREBY ORDERED, that the remaining days of the 30 days EHM ordered by this court in the above referenced case for Michael Moriarty shall be stayed pending the outcome of Court of Appeals, Division II, case #483378.

DATED this 19th day of February, 2016.


Honorable


Barbara Corey, WSBA #11778
Attorney for Defendant


Mark McClain WSBA# 30909
Pacific County Prosecutor's Office

AGREED ORDER STAYING EHM PENDING APPEAL
Page 1

Law Offices of Barbara Corey, PLLC
902 South 10th Street
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PACIFIC COUNTY PROSECUTOR

September 01, 2016 - 1:45 PM

Transmittal Letter

Document Uploaded: 6-483378-Respondent Cross-Appellant's Reply Brief.pdf

Case Name: State of Washington vs. Michael Moriarty

Court of Appeals Case Number: 48337-8

Is this a Personal Restraint Petition? Yes ☐ No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Respondent Cross-Appellant's Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Brandi Huber - Email: bhuber@co.pacific.wa.us

A copy of this document has been emailed to the following addresses:

barbara@bcoreylaw.com

mmcclain@co.pacific.wa.us

walker@co.pacific.wa.us